Nos. 78-6020 and 78-6029

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL M. BUSIC, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LAROCCA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the court of appeals (App. 36-54, 57-60) are reported at 587 F.2d 577. The opinion of the district court (App. 21-34) is not reported.

JURISDICTION

The judgment of the court of appeals (App. 55-56) was entered on January 5, 1978; thereafter, the government's petition for rehearing was granted, and the judgment on rehearing (App. 61) was entered on December 12, 1978. The petition for a writ of certiorari in No. 78-6020 was filed on January 10, 1979, and the petition for a writ of certiorari in No. 78-6029 was filed on January 11, 1979. The petitions were granted and the cases consolidated on June 4, 1979 (App. 62, 63). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether sentence may be imposed under 18 U.S.C. 924(c) where the statute creating the predicate felony permits an enhanced penalty for use of a dangerous weapon, but the enhancement provision is not invoked and thus the defendant's punishment is not doubly enhanced because of his use of a firearm (No. 78-6029).

2. Whether, in the circumstances of this case, consecutive sentences may be imposed for aiding and abetting a co-conspirator's assault with a deadly weapon (a firearm) upon a federal officer, in violation of 18 U.S.C. 2 and 111, and for unlawfully carrying a second firearm during the commission of that assault, in violation of 18 U.S.C. 924(c)(2) (No. 78-6020).

3. Whether, in the event the Court vacates petitioners' Section 924(c) sentences, the disposition of

the case that would be "just under the circumstances" (28 U.S.C. 2106) would be to remand to the district court for re-sentencing on the Section 111 counts, subject to the restriction that the re-sentence not exceed the sentence petitioners originally received for the armed assault offenses under Sections 924(c) and 111.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 924(c) provides:

> Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States[,]
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any

other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

3. 18 U.S.C. 111 provides:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on five counts of narcotics offenses, in violation of 21 U.S.C. 841(a)(1), 843(b), and 846 (Counts 1-5), and on six counts of unlawful possession of firearms, in violation of 26 U.S.C. 5861 (c) and (d), 5871, and 18 U.S.C. 922(h) and 924 (a) (Counts 8-13).[1] Petitioners were also convicted

[1] Petitioner Busic was not charged in Count 12. Busic was also convicted on three additional counts of unlawful possession of firearms, in violation of 18 U.S.C. 1202(a)(1) (Counts 14-16). Both Busic and LaRocca had previously been convicted of firearm and assault felonies (App. 11-14).

on two counts of armed assault on federal officers, in violation of 18 U.S.C. 2 and 111 (Counts 6 and 7). In addition, petitioner Busic was convicted of unlawfully carrying a firearm in the commission of a federal felony, in violation of 18 U.S.C. 924(c)(2) (Count 18), and petitioner LaRocca was convicted of using a firearm in the commission of a federal felony, in violation of 18 U.S.C. 924(c)(1) (Count 19).

Petitioners were each sentenced to a total of 30 years' imprisonment, apportioned as follows: concurrent terms of five years' imprisonment on Counts 1 through 4, with special parole terms on each count ranging from two to three years, and of four years' imprisonment on Count 5; five years' imprisonment on Counts 6 through 13, to be served concurrently with each other but consecutively to the sentences on Counts 1 through 5; petitioner Busic was also sentenced to terms of two years' imprisonment on Counts 14 through 16, to be served concurrently with each other and with the sentences imposed on Counts 6 through 13, and to 20 years' imprisonment on Count 18, to be served consecutively to all other terms; petitioner LaRocca was sentenced to 20 years' imprisonment on Count 19, to be served consecutively to all other terms.

The evidence at trial showed that Charles D. Harvey, an undercover agent of the Drug Enforcement Administration, first met petitioners on May 7, 1976, at the home of Richard Hervaux, a government informant. At that time petitioners agreed with Har-

vey that he would accompany them to Florida to purchase drugs from one of their suppliers for re-distribution in the Pittsburgh area. Several days later, Harvey again met with petitioners and received samples of the marijuana and cocaine that he was to purchase from their Florida source. The next day, after Harvey had arranged for his trip to Florida, LaRocca called him and insisted on seeing some "front money." A meeting was set for the following day in the parking lot of a shopping center in Monroeville, Pennsylvania (App. 38).

After he arranged for surveillance, Harvey went to the shopping center with $30,000 in cash, as agreed. Petitioners were already there in LaRocca's car. LaRocca entered Harvey's car, and the two drove to the other side of the parking lot. As Harvey withdrew the money from the trunk, LaRocca reached for his gun. Harvey ran, but LaRocca caught him and pointed his gun at Harvey's chest. At that point Harvey gave a pre-arranged signal to the surveillance agents; as the agents began to converge on the scene, LaRocca fired at Harvey and missed. LaRocca then fired two shots at the vehicle containing agents Alfree and Petraitis of the Bureau of Alcohol, Tobacco, and Firearms, and two shots at the vehicle containing agent Macready of the DEA. LaRocca was immediately arrested and disarmed (App. 38-39).

The officers also arrested Busic, who had been leaning on a nearby car during the shootout. Upon his arrest, Busic exclaimed, "Remember, I didn't shoot at anybody and I didn't pull my gun" (Tr. 41).

Busic was thereupon searched, and a pistol was found in his belt. A search of LaRocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. An inventory search of the car conducted the following day disclosed yet another pistol under the driver's seat and another box of ammunition in the glove compartment (App. 39).

In an opinion issued prior to the decision of this Court in *Simpson* v. *United States*, 435 U.S. 6 (1978), the court of appeals held that 18 U.S.C. 924(c)(1) is applicable to a defendant who is also charged with aggravated assault of a federal officer under 18 U.S.C. 111 (App. 41-43). It further held, however, that when the deadly weapon used in the Section 111 assault is a firearm and the felony charged under Section 924(c)(1) is the assault that forms the basis of the charge under Section 111, sentencing the defendant on both counts would violate the Double Jeopardy Clause (*id.* at 43-47). Accordingly, the court of appeals remanded petitioner LaRocca's case to the district court for resentencing under either Section 111 or Section 924(c)(1), at the government's election, but not both (App. 47). In contrast, the court affirmed petitioner Busic's convictions because it concluded that a prosecution for unlawfully carrying a weapon during the commission of a felony under 18 U.S.C. 924(c)(2) requires proof of an element—the unlawful possession of a firearm—that is not an element of the offense under Section 111 (App. 47-48).

Following this Court's decision in *Simpson*, the court of appeals granted a petition for rehearing, vacated the portion of its first opinion dealing with the Double Jeopardy Clause, and reached the same disposition of the case by applying the rationale of this Court's opinion in *Simpson* (App. 57-60). The court of appeals concluded (*id.* at 59-60) that *Simpson* prohibits sentencing a defendant under both Section 111 and Section 924(c)(1), but that the government has the option of proceeding under either section; accordingly, it remanded LaRocca's case for resentencing, in the discretion of the government, under either Section 111 or Section 924(c)(1).[2] The court found the rationale of *Simpson* inapplicable to Busic's conviction under Section 924(c)(2) for unlawfully carrying a firearm during the commission of a felony, and it affirmed that conviction (*id.* at 60).

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[2] The court of appeals, both in its original opinion (App. 47 n.5) and again on rehearing (App. 60 n.3), rejected the government's alternative argument that LaRocca's conviction under Section 924(c) could be upheld on the ground that petitioners' firearms were carried and used not only in the commission of the assault offense, but also in the commission of the narcotics conspiracy of which the jury had convicted them. The court concluded that "[i]t is a fair inference from the record that the conspiracy to distribute drugs terminated as of the time that [petitioners] decided to rob Harvey" and that "the jury was entitled to convict [petitioners] on these [conspiracy] counts even if it found that the conspiracy was shorter in duration than was charged in the indictment" (App. 47 n.5). We do not press that argument in this Court, and thus it can be assumed that the predicate felony for petitioners' convictions under Section 924(c) was the assault on federal officers.

SUMMARY OF ARGUMENT

In *Simpson* v. *United States*, 435 U.S. 6 (1978), this Court held that in a prosecution for a bank robbery committed with firearms "where the Government relied on the same proofs to support the convictions under [18 U.S.C. 924(c) and 18 U.S.C. 2113(d)]" (435 U.S. at 12), Congress did not intend "to authorize, * * * not only the imposition of the increased penalty under § 2113(d), but also the imposition of an additional consecutive penalty under § 924(c)" (435 U.S. at 8). The Court found that the legislative history of Section 924(c), although "sparse" (435 U.S. at 15), "points in the direction of a congressional view" (*ibid.*) that cumulative penalties under Section 924(c) were not to be imposed when the defendant had already received an enhanced sentence under Section 2113(d) for the same conduct. The Court also concluded that "to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(d) would violate the established rule of construction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" (435 U.S. at 14; citation omitted).

I

In No. 78-6029, petitioner LaRocca presents the question whether a defendant who uses a firearm to assault a federal officer may be sentenced, at the discretion of the government, either under 18 U.S.C. 924(c)(1) or under the enhancement provision of 18 U.S.C. 111. While we acknowledge that the hold-

ing in *Simpson* would bar an enhanced sentence under Section 111 for armed assault and an additional, cumulative sentence under Section 924(c)(1) for use of the same firearm, *Simpson* does not resolve the distinct question whether sentence may be imposed under Section 924(c)(1) when the defendant is not sentenced to the enhanced penalty provided in Section 111. In our view, "[t]he overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text" (*Board of Education of the City of New York* v. *Harris*, No. 78-873 (Nov. 28, 1979), slip op. 10) of Section 924(c) all support the court of appeals' decision that a defendant can be sentenced, at the government's election, either under Section 924(c) or under the enhancement provision of the predicate felony.

The language of Section 924(c) unambiguously states that it applies to all federal felonies, and no exception is made for felonies that have their own enhancement provision for using a dangerous weapon. In addition, the penalties provided in Section 924(c) were specially designed to deter firearm violations and are qualitatively and quantitatively different from those contained in Section 111. Under Section 924(c), the sentence imposed for the firearm offense cannot be concurrent to the sentence for the predicate felony and, in cases of repeat offenders, the defendant cannot receive probation or a suspended sentence. None of these restrictions is applicable to a sentence under Section 111. Likewise, Section 924(c) provides a minimum mandatory sen-

tence of one year's imprisonment, and a maximum of 10 years' imprisonment, for a defendant convicted of his first firearm offense; for repeat offenders, the mandatory minimum term of imprisonment is two years, with a maximum of 25 years. Section 111, on the other hand, provides a sentence of no more than 10 years' imprisonment for an armed assault of a federal officer (an enhanced penalty of only seven years above the maximum term of three years for simple assault), requires no mandatory minimum sentence, and makes no provision for increased sentences for recidivists. Given these differences in the penalty structures, it is highly unlikely that Congress intended that a defendant who used a firearm to assault a federal officer would be completely exempt from sentence under Section 924(c) and would be subject only to the lesser punishment provided in Section 111. A contrary conclusion in this case, unlike in *Simpson*, would not "give[] full play to[] the deterrence rationale of § 924(c)" (435 U.S. at 14). Moreover, acceptance of petitioners' construction of Section 924(c) would lead to the improbable results, again not likely to have been intended by Congress, of punishing more leniently (a) the use of a firearm to assault a federal officer than the use of the same firearm to commit virtually any other federal felony, and (b) the actual use of the firearm to commit an assault than unlawfully carrying (but not using) the firearm during the commission of an assault.[3]

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[3] Prior to enactment of Section 924(c), the offenses of bank robbery and assault on a federal officer were singled out from the entire panoply of federal offenses as ones requiring spe-

The legislative history of Section 924(c) further supports the view that Congress intended defendants who use firearms to assault federal officers would be subject to the stiff penalties specified in that provision. The Gun Control Act of 1968 in general, and Section 924(c) in particular, were enacted to increase both the deterrence and the punishment of firearm offenses. These objectives were forcefully advanced by Congressman Poff, who introduced the floor amendment that was substantially enacted as Section 924(c), and his proposal was specifically designed to increase both the certainty and the length of imprisonment for firearm offenders. While Congressman Poff did state, in a passage heavily relied on in *Simpson*, that his amendment "is not intended to apply to title 18, section[] 111 * * * which already define[s] the penalties for the use of a firearm in assaulting officials" (114 Cong. Rec. 22232 (1968)), it is inconceivable that he intended by this statement that defendants who used firearms to assault federal officers would be exempt altogether from the specific and strict penalty scheme of Section 924(c).

We do not believe that Congressman Poff was addressing himself to the question (which was not raised in the debates) whether Section 924(c) could be invoked *in lieu of* the enhancement provisions in

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cial deterrents, in the form of increased penalties, to the use of firearms in their commission. It defies reason to suppose that in 1968, when Section 924(c) was enacted, Congress completely reversed its field and concluded that the offenses for which more severe penalties had previously been applied should thereafter be treated with special leniency.

existing law for using dangerous weapons. It is one thing to conclude on the basis of this statement, as the Court did in *Simpson*, that Congress did not intend to permit the double enhancement of sentences where a defendant is charged and convicted under both Section 924(c) and the aggravated offense provisions of Sections 111 or 2113; it is quite a different matter, however, to determine that Congress meant to foreclose the prosecutor from charging, and the court from sentencing, under the penalty provisions of Section 924(c) at all.

Moreover, Congressman Poff expressly recognized that existing law was inadequate to deter and punish crimes involving the use of firearms. Indeed, Congressman Poff voted against the Conference Report, even though it adopted his amendment in large measure, because it modified his proposal by deleting the prohibition on concurrent sentences and limiting to repeat offenders the ban on probation and suspended sentences. In light of his clear and strongly held position on the need for more severe penalties for firearm offenses and his vote against the Conference Report because it weakened certain sentencing provisions in his amendment, we submit it is highly unlikely that Congressman Poff intended that armed assaults on federal officers be punished solely under the existing enhancement provision of Section 111—a provision that not only has lesser terms of incarceration than Section 924(c), but also contains no restrictions against suspended or concurrent sentences or probation. The legislative history contains no suggestion

that Congressman Poff did not fully expect that defendants who used firearms to assault federal officers would be subject to the stringent penalties under Section 924(c) that were specifically enacted to curb firearm offenses.

Since the text and legislative history of Section 924(c) clearly show that its penalty provisions were intended to be applicable here, there is no occasion to resort to the rule of lenity. "[I]n the instant case there is no ambiguity to resolve. * * * Where, as here, 'Congress has conveyed its purpose clearly, * * * we decline to manufacture ambiguity where none exists.'" *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7, quoting *United States* v. *Culbert*, 435 U.S. 371, 379 (1978).

II

In No. 78-6020, petitioner Busic contends that *Simpson* prohibits the imposition of consecutive sentences for an armed assault on a federal officer, in violation of the enhancement provision of 18 U.S.C. 111, and for unlawfully carrying a firearm during the commission of that assault, in violation of 18 U.S.C. 924(c)(2). In the circumstances of the present case, this contention is without merit. Petitioner Busic was convicted and sentenced under 18 U.S.C. 2 and 111 for aiding and abetting LaRocca's use of a firearm to assault federal officers; Busic was sentenced to an enhanced penalty under Section 111 because LaRocca, aided and abetted by Busic, had used a firearm. In addition, Busic was also convicted and sentenced under Section 924(c)(2) for unlawfully carrying (but not using) a second firearm during the commission of that assault. Busic's two consecutive sentences on these convictions are thus based on two separate firearms; Busic is directly liable for unlawfully carrying his own gun and is vicariously liable as an aider and abettor for LaRocca's use of a firearm. Nothing in *Simpson* remotely precludes this result.

Nor do these consecutive sentences violate the Double Jeopardy Clause. Under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), each of the offenses under 18 U.S.C. 2 and 111 and 18 U.S.C. 924(c)(2) plainly "requires proof of a fact which the other does not." Furthermore, since the two offenses in this case related to separate firearms, the government was required to prove as independent facts that a different firearm was involved in each count; proof regarding the firearm in one offense did not serve to satisfy any of the elements of the other offense. See *Brown* v. *Ohio*, 432 U.S. 161, 167 n.6 (1977). Accordingly, the Double Jeopardy Clause does not bar Busic's consecutive sentences.

III

In the event the Court disagrees with our principal contention and vacates petitioners' sentences under Section 924(c), we submit that the disposition of the case that would be "just under the circumstances" (28 U.S.C. 2106) would be to remand for re-sentencing on the Section 111 counts, subject to the restriction that the re-sentence could not exceed the sentences petitioners originally received for the armed assault offenses under Sections 924(c) and 111.

Petitioners were each convicted on more than a dozen felony counts, including, as relevant here, two armed assaults on federal officers. Prior to the decision in *Simpson* v. *United States*, petitioners were sentenced to 25 years' imprisonment for these armed assaults—20 years' imprisonment under Section 924 (c), and five years' imprisonment under Section 111 (concurrent with other terms of incarceration that are unaffected by this appeal). Petitioners' armed assaults on federal officers—whether denominated as violations of Section 924(c), or of Section 111, or both—plainly warrant the severe condemnation and punishment ordered by the district court. However, if this Court overturns petitioners' Section 924(c) sentence but does not remand for re-sentencing on the Section 111 counts, only a five-year term of imprisonment would be imposed for the armed assault offenses. Such an unforeseen and undeserved windfall to petitioners should not be countenanced.

The Double Jeopardy Clause does not bar such resentencing. As this court has recognized in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Bozza* v. *United States*, 330 U.S. 160 (1947), the Double Jeopardy Clause does not in all situations protect a defendant from receiving a greater sentence than was initially imposed. In particular, we submit that the Double Jeopardy Clause does not require the Court to ignore the important "societal interest in punishing one whose guilt is clear" (*United States* v. *Tateo*, 377 U.S. 463, 466 (1964)) and in ensuring that such punishment is commensurate with the character of

the defendant and the nature and severity of his criminal conduct. In the instant case, petitioners' original sentences under Section 924(c) and Section 111 derive from the same armed assaults on federal officers, petitioners have initiated the appellate proceedings that give rise to the need for re-sentencing, and the re-sentencing we advocate would not exceed the sentence for the armed assault offenses that petitioners initially received. In these circumstances, it cannot be said in any meaningful sense that re-sentencing would be "an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect" (*United States* v. *Scott*, 437 U.S. 82, 91 (1978)) or would subject petitioners to "multiple punishments for the same offense" (*North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717).

ARGUMENT

I. A DEFENDANT WHO USES A FIREARM TO COMMIT AN ASSAULT UPON A FEDERAL OFFICER MAY BE SENTENCED, AT THE GOVERNMENT'S ELECTION, UNDER EITHER THE AGGRAVATED ASSAULT PROVISION OF 18 U.S.C. 111 OR THE FELONY-FIREARM PROVISION OF 18 U.S.C. 924 (c)(1)

A. Section 924(c) By Its Terms Applies To Felonies That Provide An Enhanced Penalty For The Use Of A Dangerous Weapon.

This Court has repeatedly recognized that the primary guide to the meaning of a statute is its text. See, *e.g.*, *Perrin* v. *United States*, No. 78-959 (Nov. 27, 1979), slip op. 5; *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 4; *Touche Ross & Co.* v.

Redington, No. 78-309 (June 18, 1979), slip op. 7-8; *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6; *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 3-4; *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Scarborough* v. *United States*, 431 U.S. 563, 569 (1977); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 200-201 (1976); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). Here, the language defining the offense in Section 924(c) clearly supports our position that a defendant may be sentenced under that provision notwithstanding that the predicate felony provides, as an alternative to Section 924(c)(1), an enhanced penalty for using a dangerous weapon. Section 924(c) on its face states plainly that it applies to anyone who "uses a firearm to commit *any felony* for which he may be prosecuted in a court of the United States" and that such a person "shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years" (emphasis added).[4] A felony for such purposes is defined by 18 U.S.C. 1(1) as "[a]ny offense punishable by death or imprisonment for a term exceeding one year," a definition that clearly includes assaulting a

[4] More severe sanctions are imposed upon a second or subsequent offender, who faces a sentence of at least two and as many as 25 years' imprisonment.

federal officer in violation of 18 U.S.C. 111. Thus, while it does not speak to the double enhancement issue presented in *Simpson*, Section 924(c) by its terms does authorize sentencing pursuant to its provisions for the commission of a federal felony with a firearm regardless of whether the predicate felony contains an enhancement provision for the use of a firearm or other dangerous weapon.

B. The Sentencing Provisions Of Section 924(c) Demonstrate Congress' Intent That Punishment Be Imposed In Accordance With The Terms Of That Statute Notwithstanding That The Predicate Felony Contains An Enhanced Penalty For The Use Of A Dangerous Weapon.

This construction—that sentence may be imposed under Section 924(c) even where the underlying felony provides an enhanced penalty for the use of a dangerous weapon—is supported by the sentencing provisions of Section 924(c). Instead of merely authorizing imposition of longer terms of incarceration than can be imposed under the various enhancement statutes, Section 924(c) establishes mandatory minimum sentences, requires increasingly severe sentences for recidivists (without possibility of suspension or probation), and prohibits concurrent sentencing. Thus, a first offender under Section 924(c) must receive at least a one-year consecutive sentence and may receive a 10-year consecutive sentence, while a repeat offender must serve (without suspension or probation) a minimum two-year consecutive sentence and may receive (without suspension or probation) a

consecutive 25-year sentence.[5] By contrast, neither Section 111 nor Section 2113(d) prescribes mandatory minimum sentences or prohibits concurrent sentences, suspended sentences or probation. Moreover, the maximum sentence of 10 years' imprisonment under the enhancement provision of Section 111 is only seven years greater than the maximum sentence for simple assault, and no increased penalty is provided for second or subsequent offenders.[6]

In our view, it is most unlikely that Congress intended to subject persons who commit armed assaults on federal officers to lesser penalties, and thus to a lesser deterrent, than all other gun-wielding felons. Having specifically studied the firearm problem, Congress responded by enacting the strict, and unique, sentencing provisions of Section 924(c) in order to deter and punish more severely the incidence of firearm offenses. No reason suggests itself why Congress conceivably would have exempted from this specific

[5] As we discuss below (pages 24-37, *infra*), these comprehensive penalties reflect Congress' determination to curb the particularly lethal risks created by the use of a firearm in the commission of a felony—risks that Congress could legitimately have concluded are more serious than the risks attending the use of any other dangerous weapon, which would be sufficient to trigger the enhancement provision of Section 111.

[6] Similarly, the maximum sentence for aggravated bank robbery under Section 2113(d) is only five years greater than the maximum for simple bank robbery, whether or not the robber is a recidivist. In contrast, under Section 924(c), the use of a gun in the commission of the robbery would subject the defendant to an additional sentence of up to 10 years for a first offense and up to 25 years for a second offense. See *United States* v. *Brown*, 602 F.2d 909, 912 & n.2 (9th Cir. 1979).

firearm legislation those defendants who use such firearms to commit federal felonies that have their own enhancement provisions for the use of dangerous weapons.[7] Petitioners' construction of Section 924(c) has the perverse consequence of rendering the stiff penalty provisions that Congress enacted to deter the increasing use of firearms inapplicable to the very class of offenses—including assault on a federal officer and bank robbery—where Congress had already found that enhanced penalties were needed to deter and punish those who used dangerous weapons. Unlike in *Simpson*, where the Court found that double enhancement of punishments was not necessary to promote the statutory objectives, it cannot be concluded in the present case that petitioners' argument "is in complete accord with, and gives full play to, the deterrence rationale of § 924(c)" (435 U.S. at 14).

Nor is it possible fairly to conclude that Congress intended (or that the language of the statute should be ignored in order to bring about) the irrational re-

[7] Indeed, the principle of giving "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern"—on which the Court relied in *Simpson* (435 U.S. at 15)—suggests that in a case where a firearm is employed in the commission of a bank robbery or an assault on a federal officer, the more specific firearm provision in Section 924(c) should be given precedence over a more general enhancement provision for dangerous weapons. Moreover, Section 924(c), which was enacted in 1968, long after the enhancement provisions of Section 111 or Section 2113, more fairly reflects the contemporary congressional view of the gravity of the use of firearms in the commission of federal felonies. See page 43 *infra*.

sults that would follow from petitioners' construction of Section 924(c), some of which may be illustrated by the following examples:

(a) John Doe assaults a federal officer, threatening him with a knife; Richard Roe assaults a federal officer with a firearm, shooting him and wounding him severely. Both are subject only to the penalties provided by Section 111, which allows seven years' enhancement for the use of any dangerous weapon. This result does not square with the intent of Congress in enacting Section 924(c) to punish with special severity the criminal use of firearms.

(b) John Doe burglarizes a post office (18 U.S.C. 2115), using a firearm to shoot the lock off the door; Richard Roe robs a bank with a firearm, firing a number of shots at patrons and employees of the bank, seriously wounding several. Doe is subject to ten years' imprisonment under Section 924(c), Roe only to an enhanced penalty of five years' under Section 2113(d). Congress could not rationally have intended such a discrepancy simply because Roe used his firearm to rob a bank.

(c) Continuing their criminal careers, Doe and Roe together use firearms to hijack an interstate shipment (18 U.S.C. 659). As a second offender under Section 924(c), Doe is subject to an additional penalty of a minimum of two years and as much as 25 years' punishment, which may not be suspended or made concurrent with the sentence for the theft. Roe, on the other hand, although having committed two prior crimes of violence employing firearms (as compared

to one firearm crime involving no danger to individuals by Doe), must be treated as a first offender under Section 924(c), subject to a maximum term of 10 years' imprisonment, 15 years less than that applicable to Doe, and eligible for a concurrent sentence or probation on the firearm charge. Again, it is impossible to square the more lenient treatment of Roe, who has a more serious history of firearms abuse, with the manifest congressional goal of punishing such abuse severely.

(d) Doe robs a bank, unlawfully carrying but not using a firearm; Roe robs a bank, using a firearm. If we are correct that Section 924(c) is applicable to one who unlawfully carries (but does not use) a firearm during the commission of a felony that provides an enhanced penalty for using a dangerous weapon,[8] Doe is subject to the more severe penalties

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[8] Taken literally, petitioner Busic's contention that Section 924(c) does not apply when the underlying felony provides enhanced punishment for the use of a firearm (78-6020 Br. 9) would mean that a defendant could not be punished under Section 924(c)(2) for unlawfully carrying a firearm during a bank robbery or an assault on a federal officer. However, since the enhancement provisions of those offenses do not penalize carrying, but not using, a dangerous weapon, the end result would be that a defendant who unlawfully carries a firearm would receive no enhanced sentence and would be subject to the same punishment as a defendant who committed the offense without carrying a firearm. Such an unsupportable result would be directly contrary to Congress' establishment of a separate offense in Section 924(c)(2) for unlawfully carrying a firearm during the commission of a federal felony, and would ignore the express congressional purpose in adding Section 924(c) to the Gun Control Act "to

of Section 924(c) and Roe, whose offense is plainly more serious, is not. This inconsistency again flies in the face of the clear legislative purpose of Congress in enacting Section 924(c).

Rather than attributing such untenable results to the Congress, we believe that Section 924(c) should be interpreted, in accord with its clear language, to allow sentences to be imposed under its provisions even though the predicate felony contains an enhanced penalty for the use of a dangerous weapon.

C. The Legislative History Of Section 924(c) Confirms That The Sentencing Provisions Of That Statute Are Applicable Even Though The Underlying Felony Provides An Enhanced Penalty For The Use Of A Dangerous Weapon.

The Gun Control Act of 1968 (Pub. L. No. 90-618, 82 Stat. 1213), of which Section 924(c) is a part, was enacted largely in response to a single concern:

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persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968) (remarks of Congressman Poff). Even Congressman Poff's statement that Section 924(c) "is not intended to apply" to 18 U.S.C. 111 or 18 U.S.C. 2113 (114 Cong. Rec. 22232 (1968)), upon which the Court heavily relied in *Simpson* (435 U.S. at 13-14), was limited to those statutes that provided an enhanced penalty for the *use* of a firearm. Thus, there is no basis for imputing to Congress the loophole that would exist if the penalties under Section 924(c)(2) for unlawfully carrying a firearm are not applicable to those federal felonies, such as Sections 111 and 2113, that contain an enhancement provision for using a dangerous weapon.

the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime" (H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968)). The worsening crime situation in recent years had aroused considerable attention and alarm in Congress. During 1967, Congress held extensive hearings on crime control legislation, including proposed gun control bills, in which frequent references were made to the fact that in 1965 firearms were used in approximately 5,600 murders, 34,700 aggravated assaults, and the vast majority of the 68,400 armed robberies, and that guns killed all but 10 of the 278 law enforcement officers murdered in the preceding five years.[9] More recent and even more troubling statistics on the use of firearms in violent crime were cited in Attorney General Clark's letter to Congress requesting adoption of the Gun Control Act (H.R. Rep. No. 1577, *supra*, at 18-20) and in the Senate and House Judiciary Committee Reports on the Act (*id.* at 7-8; S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

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[9] These figures were set forth in the Report by the President's Commission on Law Enforcement and Administration of Justice, published in February 1967 as *The Challenge of Crime In A Free Society* 239. See *Anti-Crime Program: Hearings on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 213, 241, 261 (1967). The Crime Commission's Report was also considered by the Senate Judiciary Committee in connection with the legislation eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess. 31 (1968). The Committee Report on that bill cited further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission Report (*id.* at 76).

Congress confronted the danger revealed by these figures with a two-pronged approach. First, it expanded federal control over the sale and shipment of firearms across state lines by prohibiting gun sales to out-of-state purchasers and to minors and by forbidding their purchase through interstate mail orders. See 18 U.S.C. 922. Second, it attacked the crime problem directly by punishing the use and unlawful carrying of firearms in the commission of serious crimes. Section 924(c), introduced and adopted on June 19, 1968, was addressed to the second objective.[10]

The language that became Section 924(c) was offered by Congressman Poff as a substitute for a floor amendment made by Congressman Casey to the House version of the Gun Control Act. 114 Cong. Rec. 22231 (1968).[11] The Casey amendment had pro-

[10] Because the statute was introduced on the floor of the House and approved on the same day, there are no legislative hearings and no committee reports concerning it; the pertinent legislative history is contained in a few pages of the Congressional Record and consists primarily of the views of supporters of the House bill and its Senate counterpart. See *Simpson* v. *United States*, 435 U.S. 6, 13 n.7 (1978).

[11] As introduced, the Poff amendment provided:

* * * * *

(c) Whoever—

(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

vided stiff minimum penalties for anyone who, "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce" (*id.* at 22229).[12] Supporters of the Poff substitute noted that the Casey language applied to the use or possession of firearms in state as well as federal felonies, and would thereby convert thousands of state offenses into federal violations. This result was criticized both as an intrusion

shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years. The execution or imposition of any term of imprisonment imposed under this subsection may not be suspended, and probation may not be granted. Any term of imprisonment imposed under this subsection may not be imposed to run concurrently with any term of imprisonment imposed for the commission of such felony.

Some modifications concerning the penalty provisions of the Poff proposal were subsequently adopted. See page 34 & note 16, *infra*.

[12] The text of the Casey amendment provided:

That whoever during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce shall be imprisoned—

(1) in the case of his first offense, for not less than ten years;

(2) in the case of his second or more offense, for not less than twenty-five years.

upon state jurisdiction and as the source of an unmanageable load of criminal cases in the federal system. *Id.* at 22232-22235. Other Congressmen felt that the provision violated principles of due process and equal protection or that the burden of proving the jurisdictional nexus unacceptably weakened the amendment. *Id.* at 22231 (remarks of Congressman Poff); *id.* at 22233 (remarks of Congressman Cramer).

The substitute amendment presented by Congressman Poff was intended to cure the perceived defects in the Casey proposal by making it a separate federal offense to use or unlawfully carry a firearm during the commission of "any felony which may be prosecuted in a court of the United States" (*id.* at 22231). In introducing his substitute, Congressman Poff made clear his intention to strengthen, not weaken, the Casey proposal (*ibid.*):

> [M]y amendment is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment.
>
> * * * Indeed, the substitute is stronger. The substitute provides that the penalties cannot be suspended and that probation cannot be granted. The Casey amendment contains no such provision.
>
> My substitute is also stronger in that it compels the court to impose the sentence to run consecutively upon the penalty previously imposed for the basic crime. The Casey amendment permits the court to make the two penalties run concurrently and to suspend any part or all of either or both.

In addition, in an ensuing discussion with Congressman Cramer, Congressman Poff emphasized that his amendment would broaden the range of federal felonies to be covered by the statute (*id.* at 22233):

> MR. CRAMER. * * *
>
> Thirdly, and really what bothers me the most, is that the Casey amendment does not cover an adequate number of crimes, including Federal crimes. It does not even cover the large number of heinous Federal crimes to which the amendment offered by the gentleman from Virginia [Mr. Poff] would apply; is that correct?
>
> MR. POFF. My amendment would apply to all Federal felonies including heinous crimes in all grades, down to the lowest level of a felony.
>
> * * * * *
>
> MR. CRAMER. * * *
>
> And in the list of crimes the gentleman referred to three or four pages there, any number of those heinous crimes are not included under the Casey amendment; is that correct?
>
> MR. POFF. That is correct.
>
> * * * * *
>
> MR. POFF. Insofar as it is defined in the Federal code as a felony itself, it would be included [in the Poff amendment].[13]

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[13] See also 114 Cong. Rec. 22232 (1968) (emphasis added):

> MR. ICHORD: * * *
>
> * * * * *
>
> Are you contemplating—the gentleman makes it a Federal offense, another separate Federal offense to use

Despite the breadth of his substitute, however, Congressman Poff made an additional statement upon which the Court in *Simpson* chiefly relied (435 U.S. at 13-14), and which is again strongly urged by petitioners here. After noting that his amendment did not pertain to state offenses, Congressman Poff added (*id.* at 22232);

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.

No response or other comment was directed at this remark, and the debate reverted immediately to the issue of excluding state crimes.

Whatever insight this passage might provide into the congressional intent concerning the issue pre-

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a firearm *to commit any felony which may be committed.* If during the commission of *any felony* wherein such firearm is used the party may be prosecuted in any court of the United States? Does the gentleman contemplate the second criminal proceeding or can this man be tried in the original proceeding where he was first tried?

MR. POFF: * * *

The answer to his question is in the affirmative; namely, it would be expected that the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties may grow.

sented in *Simpson*, it does not serve to answer the question raised here. We do not believe that Congressman Poff's statement was addressed to the question (which was not raised in the debates) whether Section 924(c) could be invoked in lieu of the enhancement provisions in existing law for using dangerous weapons. It is one thing to conclude on the basis of this statement, as the Court did in *Simpson*, that Congress did not intend to permit the double enhancement of sentences where a defendant is charged and convicted under both Section 924(c) and the aggravated offense provision of Sections 111 or 2113; it is an entirely different proposition, however, to determine that Congress meant to preclude the government from prosecuting, and the court from sentencing, under the penalty provisions of Section 924(c) at all.

Moreover, viewing Congressman Poff's statements in their entirety, the legislative history of Section 924(c) fails to offer any suggestion that Congress did not intend to apply the stringent penalty provisions of that statute to defendants who used firearms to commit even those federal felonies that had their own enhanced penalty for using a dangerous weapon. Indeed, one of the principal purposes of the Poff amendment was to increase the deterrent to the use of firearms in federal felonies.[14] In explaining the

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[14] As stated by Congressman Horton (114 Cong. Rec. 22247 (1968)):

> When a person commits a crime with a firearm, he uses his weapon to terrorize his victim with the threat

minimum mandatory sentence provision in his proposal, Congressman Poff stated (114 Cong. Rec. 22231 (1968)):

> The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time.

In a later colloquy with Congressman Cramer, Congressman Poff reiterated that his amendment, unlike the Casey proposal, required mandatory minimum sentences and eliminated concurrent and suspended sentences. *Id.* at 22233. The importance of this aspect of the Poff amendment was emphasized by a number of congressmen during the debates. As Congressman Railsback remarked (*id.* at 22243):

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that, with the flick of his finger, he can snuff out one or more innocent lives. Even where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons effective only at a very short range. The "equalizer," as it has been called, is a tool of terror, death, and injury in the hands of a criminal. He who stoops to point its barrel at an innocent victim, for money, for revenge, for "kicks," or for any other purpose, deserves to be singled out by the laws as the worst kind of social menace.

Mr. Chairman, I believe that [the Poff] amendment, which adds more severity to the punishment of such offenders, is a legislative necessity.

> Mr. Chairman, one of the major differences between the Casey amendment and the substitute amendment offered by the gentleman from Virginia [MR. POFF], is that in the one case the sentence cannot, specifically cannot be suspended, nor can probation be granted. And that is why many of us feel that the Poff amendment is superior in that important respect. Many of us want to support a minimum mandatory penalty which is provided in the Poff substitute, and which is not provided in the Casey amendment.

Congressman Latta offered a similar view, stressing that the Poff amendment would create a significantly greater deterrent than was provided by existing law (*ibid.*; emphasis added):

> I want the criminal to know before he uses a firearm in committing a crime that, when he is convicted, just as sure as the sun rises tomorrow he is going to jail for a certain number of years. *This is the deterrent that I want to see written into this law, and I do not want any discretion by any court because that is the bugaboo in our present system.* He believes that he can beat the rap, and he takes the chance. I want him to know that he cannot beat the rap and that he is going to prison when convicted.[15]

The Poff amendment was adopted by the House in lieu of the Casey proposal (114 Cong. Rec. 22248

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[15] See also, *e.g.*, 114 Cong. Rec. 22234 (1968) (remarks of Cong. Harsha); *id.* at 22237 (remarks of Cong. Rogers); *id.* at 22243 (remarks of Cong. Wyman); *id.* at 22247-22248 (remarks of Cong. Horton).

(1968)), and the Gun Control Act, including the Poff amendment, passed the House by a vote of 412 to 11 (*id.* at 23094). Following the passage of a different bill by the Senate, the Conference Committee accepted in large measure the House version of Section 924(c). However, the Conference deleted altogether the prohibition on concurrent sentences and made the provision eliminating probation and suspended sentences applicable only to second and subsequent convictions. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).[16] These modifications in Conference caused great concern in the House, and many congressmen objected to the changes and urged that the Conference Report be rejected. As succinctly summarized by Congressman MacGregor (114 Cong. Rec. 30580 (1968)):

> The conferees * * * have destroyed the effectiveness of the Poff amendment on minimum mandatory sentences.

A similar assessment was offered by Congressman Collier (*id.* at 30584):

[16] The Conference version of Section 924(c) was ultimately accepted by the House (114 Cong. Rec. 30587 (1968)) and the Senate (*id.* at 30183), and the bill was signed by the President on October 22, 1968.

Title II of the Omnibus Crime Control Act of 1970 (Pub. L. No. 91-644, 84 Stat. 1889) amended Section 924(c) by reinstating the restriction that no sentence of imprisonment thereunder could be served concurrently with any term imposed for the underlying felony. The amendment also reduced the minimum mandatory sentence of imprisonment for repeat offenders from five to two years. See *Simpson* v. *United States*, *supra*, 435 U.S. at 14 n.9.

> Mr. Speaker, I am deeply disturbed and disappointed that the conferees have seen fit to gut one of the most important provisions of the bill which passed the House on the Gun Control Act of 1968. * * * I believe that removal of the mandatory sentence for commission of a crime or felony while in possession of a firearm eliminates an important aspect of the deterring features of the bill. I regret that the conference report also provides for the mandatory sentence for second offenders to run concurrent with that of penalties for other convictions.[17]

Among the most vigorous opponents of the Conference Report was Congressman Poff himself, notwithstanding that the Conference had adopted much of the amendment he had introduced (114 Cong. Rec. 30583 (1968); emphasis added):

> MR. POFF. * * *
>
> If the real purpose of gun control legislation is to control crime, then the central control mechanism of this bill has been fractured. As the bill passed the House, the central crime control mechanism was the mandatory jail sentence amendment. * * *
>
> * * * * *
>
> * * * [My amendment] was designed to persuade the man who has decided to set forth on a criminal venture to leave his gun at home. It

[17] See also, *e.g.*, 114 Cong. Rec. 30579 (1968) (remarks of Cong. Cramer); *id.* at 30581 (remarks of Cong. MacGregor); *id.* at 30581-30582 (remarks of Cong. Hunt); *id.* at 30582 (remarks of Cong. Watson); *id.* at 30584 (remarks of Cong. Hansen); *id.* at 30585 (remarks of Cong. Hall); *ibid.* (remarks of Cong. Skubitz); *id.* at 30586 (remarks of Cong. Saylor).

is not the severity of punishment that deters. It is the certainty of punishment that deters.

In the posture which the conference report leaves it, the amendment will not promote certainty of punishment. Rather, with respect to the first offense, *actual time in jail will be no more certain than it is today.* The criminal who is tempted to use a gun in the commission of his crime can still do so with the full knowledge that he has at least a 50-50 chance, even after being caught, convicted and sentenced, of never serving a day in jail. And even if it is his second offense, he knows that any jail term he may be required to serve may run concurrently with the same term that can be imposed under present law for the base felony.

With such odds, why should he refrain from using a gun?

Because the Conference had thus weakened the sentencing provisions of his amendment, Congressman Poff voted against the Conference Report. Given his strong views on the need for certainty of punishment to deter armed felons, it is impossible to conclude that Congressman Poff intended that defendants who use firearms to commit a bank robbery or an assault on a federal officer would be punished entirely outside the strict penalty scheme of Section 924(c) and would instead be sentenced under Section 2113 or Section 111 without any limitation on the minimum term of imprisonment, the possibility of probation or a suspended sentence, or the availability of a concurrent sentence. Rather, it was the very inadequacy of existing law that led Congressman Poff to introduce his amendment and ultimately to oppose the Conference Report.

In sum, the legislative history shows that Section 924(c) was enacted precisely because existing law was considered inadequate to deter and punish firearm offenses, and there is no indication whatever that either the Congress as a whole or Congressman Poff intended the penalties specified in Section 924(c) to be inapplicable where the predicate felony contains its own enhancement provision for use of a dangerous weapon.[18]

D. The Decision In *Simpson* v. *United States* Is Not Dispositive Of The Issue Presented In This Case.

In light of the language and legislative history of Section 924(c), we have argued above that the court of appeals correctly held that on remand petitioner

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[18] The Court in *Simpson* also relied (435 U.S. at 14) on the Conference Committee's rejection of the Senate version of Section 924(c) in favor of the modified Poff amendment. The Senate had adopted a floor amendment introduced by Senator Dominick that was limited to the use of firearms in certain specified federal offenses (including Sections 111 and 2113) and that authorized substantial penalties in addition to those provided for the underlying felony even where the sentence imposed for that predicate felony was already enhanced. See 114 Cong. Rec. 27142-27144 (1968). In our view, this action by the Conference can best be understood as an indication of congressional intent that Section 924(c) be broadly applicable to all federal felonies rather than being limited to only certain predicate offenses. In any event, while the Court in *Simpson* construed the Conference's rejection of the Dominick amendment to support its holding that Congress did not intend to authorize cumulative sentences under *both* Section 924(c) and the aggravated predicate felony, nothing in the Conference action on the Dominick amendment suggests that Congress meant to render the stiff penalty provisions of Section 924(c) completely inapplicable whenever the underlying felony provided an enhanced punishment for using a dangerous weapon.

LaRocca could be sentenced under Section 924(c)(1). However, petitioners argue that a contrary conclusion is dictated by this Court's decision in *Simpson* v. *United States*, 435 U.S. 6 (1978), which they read to hold that a defendant may not be sentenced under Section 924(c) whenever the statute defining the predicate offense provides an enhanced punishment for using a dangerous weapon. In our view, this is far too broad a reading of *Simpson*.

The actual holding in *Simpson* was quite narrow. The Court framed the question in *Simpson* to be "whether §§ 2113(d) and 924(c) should be construed as intended by Congress to authorize, in the case of a bank robbery committed with firearms, not only the imposition of the increased penalty under § 2113(d), but also the imposition of an *additional consecutive penalty* under § 924(c)" (435 U.S. at 8; emphasis added). Concluding that Congress had not intended "the additional sentence authorized by § 924(c) to be *pyramided upon a sentence already enhanced* under § 2113(d)" (435 U.S. at 14; emphasis added), the Court held "that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under *both* § 2113(d) and § 924(c)" (435 U.S. at 16; emphasis added). Significantly, the Court did not direct that the sentence under Section 924(c) be vacated, as petitioners now contend is required by *Simpson*, but rather only "reversed and remanded to the Court of Appeals for proceedings consistent with

this opinion" (435 U.S. at 16).[19] Thus, properly read, the decision in *Simpson* holds only that a defendant may not be subjected to cumulative sentences under Section 2113(d) and Section 924(c) for using a firearm in the commission of a bank robbery; however, as the Third Circuit concluded in the instant case (App. 59), *Simpson* does not address the distinct question whether a defendant may be sentenced, in the discretion of the government, either under Section 924(c)(1) or under the enhanced predicate felony, provided that sentence is not imposed under both.[20]

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[19] Petitioner LaRocca emphasizes (78-6029 Br. 9-10, App. 1a-2a) that on remand the court of appeals in *Simpson* vacated the sentence under Section 924(c). Although petitioners in *Simpson* had expressly asked this Court to vacate the Section 924(c) judgments (76-5761 and 76-5796 Br. 8), the Court did not order any specific relief but simply "reversed and remanded to the Court of Appeals for proceedings consistent with this opinion" (435 U.S. at 16). Moreover, since the more severe sentences in *Simpson* were imposed on the Section 2113 counts rather than on the Section 924(c) counts (435 U.S. at 9), the court of appeals' decision on remand in that case is, as a practical matter, the same as the decision of the courts of appeals in this case to allow the government to elect to proceed under either Section 924(c) or the enhancement provision of the predicate felony.

[20] In addition to the Third Circuit, the Ninth Circuit has held that *Simpson* does not preclude the government from proceeding under either Section 2113(d) or Section 924(c). See *United States* v. *Brown*, 602 F.2d 909 (9th Cir. 1979). The Fifth Circuit is divided on the issue. Compare *United States* v. *Shillingford*, 586 F.2d 372, 375-376 & n.7 (5th Cir. 1978), with *United States* v. *Roach*, 590 F.2d 181, 184 (5th Cir. 1979); *United States* v. *Stewart*, 585 F.2d 799, 800 (5th Cir. 1978), cert. denied, No. 78-6007 (Apr. 30, 1979); *United States* v. *Stewart*, 579 F.2d 356, 358 (5th Cir.), cert. denied,

As we have already discussed (pages 24-37, *supra*), the legislative history relied on by the Court in *Simpson* does not aid petitioners here. It seems clear that the Congress, and especially Congressman Poff, never intended to exempt from the stringent penalties of Section 924(c) those defendants who, like petitioner LaRocca, used a firearm in the commission of one of the federal felonies containing an enhancement provision. Furthermore, as noted above (pages 19-24, *supra*), the sentencing scheme of Section 924(c) is fundamentally different from the enhancement provisions of Sections 111 and 2113, and a decision that Section 924(c) does not apply when the

439 U.S. 936 (1978); and *United States* v. *Nelson*, 574 F.2d 277, 280-281 (5th Cir.), cert. denied, 439 U.S. 956 (1978). However, the court in *Nelson* construed *Simpson* to have vacated the sentence under Section 924(c); as discussed in the text above, this reading of the *Simpson* holding is incorrect. The Second Circuit, relying in part on *Nelson*, has interpreted *Simpson* to bar a sentence under Section 924(c)(1) where the underlying felony provision is Section 2113. See *Grimes* v. *United States*, 607 F.2d 6, 17 (2d Cir. 1979). The Fourth Circuit has also stated, in a case in which the sentence was more severe under Section 2113(d) that under Section 924(c), that *Simpson* requires the Section 924(c) sentence to be vacated. *United States* v. *Vaughan*, 598 F.2d 336, 337 (4th Cir. 1979). The District of Columbia Circuit has observed in dicta that *Simpson* prevents the government from using a firearms-related provision as both the predicate felony for Section 924(c) and the basis for a separate conviction. See *United States* v. *Dorsey*, 591 F.2d 922, 941 (D.C. Cir. 1978). And, in a case decided prior to *Simpson*, the Eighth Circuit had held that an offense that had its own enhancement provision for use of a firearm could not serve as the predicate felony for Section 924(c)(1). *United States* v. *Eagle*, 539 F.2d 1166, 1171-1172 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977).

predicate offense has its own enhanced penalty would create irrational results and frustrate the deterrence objectives of the Gun Control Act.

Nor do the maxims of statutory construction invoked in *Simpson* support petitioners. Unlike *Simpson*, petitioner LaRocca cannot on remand be given cumulative sentences under Section 924(c) and the aggravated predicate felony. Thus, this is not a case "in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing * * * [which] raise[s] the prospect of double jeopardy" (435 U.S. at 11), and there is no need to construe Section 924(c) to avoid constitutional issues. In addition, "the maxim that statutes should be construed to avoid constitutional questions offers no assistance here" because, as discussed above, the construction of Section 924(c) urged by petitioners is not "'fairly possible.'" *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7-8, quoting *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977).

Moreover, the rule that ambiguity in a criminal statute should be resolved in favor of lenity, which was applied in *Simpson* to prevent the Section 924(c) sentence from being "pyramided upon a sentence already enhanced under § 2113(d)" (435 U.S. at 14), is not applicable here. The rule of lenity does not come into play unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) such that even "[a]fter [a court has]

'seiz[ed] everything from which aid can be derived' * * * [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Given the language and legislative history of Section 924(c), "there is no ambiguity to resolve. * * * Where, as here, 'Congress has conveyed its purpose clearly, * * * we decline to manufacture ambiguity where none exists.'" *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7, quoting *United States* v. *Culbert*, 435 U.S. 371, 379 (1978). See also, *e.g.*, *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 10; *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *Barrett* v. *United States*, 423 U.S. 212, 217-218 (1976). While "[a] criminal statute, to be sure, is to be strictly construed, * * * it is 'not to be construed so strictly as to defeat the obvious intention of the legislature'". *Barrett* v. *United States*, *supra*, 423 U.S. at 218, quoting *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829).[21] And the fact that Section 924(c) "provides different penalties for essentially the same conduct [as the enhancement

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[21] The propriety of applying the rule of lenity in the face of indications that Congress wished to deal severely with persons committing particular offenses is especially questionable in cases involving the use of firearms. As in *Gore* v. *United States*, 357 U.S. 386 (1958), which rejected the rule of lenity in considering punishment for narcotics offenses (*id.* at 391), the history of Section 924(c) "reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution, and punishment—tighter" (*id.* at 390).

provisions of the predicate felonies] is no justification for taking liberties with" the clear language and intent of Congress. *United States* v. *Batchelder*, *supra*, slip op. 7, citing *Barrett* v. *United States*, *supra*, 423 U.S. at 217. See also *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941).

In *Simpson* the Court also referred to the "principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later" (435 U.S. at 15). As discussed above (pages 21, 24-37 & note 7, *supra*), given Congress' thorough and recent consideration of the firearms problem in the Gun Control Act of 1968, we submit that Section 924(c) rather than Sections 111 or 2113(d) should be read as the more specific provision.[22] In any event, this principle was applied in *Simpson* only as "a corollary of the rule of lenity" (435 U.S. at 15); as we have just discussed, the rule of lenity has no bearing here.

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[22] Contrary to the assertion of petitioner LaRocca (78-6029 Br. 19), the government does not contend that "Section 924(c) would govern *to the exclusion of* Sections 2113(d) and 111 * * *" (emphasis in original). Quite often, as here, more than one federal statute covers the same criminal conduct, and it is our position in the present case that Congress has afforded the government the choice, in the exercise of its prosecutorial discretion, to proceed either under Section 924(c) or under the enhancement provision of the predicate felony. See pages 46-47, *infra*. We agree with petitioner LaRocca (78-6029 Br. 19 n.19) that Section 924(c) did not impliedly repeal the enhancement provisions of Sections 111 or 2113.

Moreover, we doubt that the canon of construction that gives precedence to the more specific statute is applicable to the provisions at issue in this case. "Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, *the two should be harmonized if possible;* but *if there is any conflict*, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling." 2A C. Sands, *Statutes and Statutory Construction* § 51.05, at 315 (1973) (footnotes omitted; emphasis added), cited in *Simpson*, *supra*, 435 U.S. at 15. Here, there is no "conflict" between Section 924(c) and the enhancement provision of Section 111. In contrast to *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973), cited in *Simpson*, *supra*, 435 U.S. at 15,[23] Sections 924(c) and 111 can co-exist in the same area, and the government's invocation of one rather than the other would not "wholly frustrate explicit congressional intent" or "evade [a statutory] requirement by the simple expedient of [defendants'] putting a different label on their pleadings." *Preiser* v. *Rodriguez*, *supra*, 411 U.S. at 489-490. Indeed, it is not at all uncommon for two federal statutes, with different penalty provisions, to apply

[23] In *Preiser* v. *Rodriguez*, the Court held that a state prisoner who challenges the fact or duration of his confinement and seeks to be released from custody must proceed under the habeas corpus statute and cannot sue under 42 U.S.C. 1983.

to the same criminal conduct. See, *e.g.*, *United States* v. *Batchelder*, *supra*, slip op. 7, 9; *United States* v. *Gilliland*, *supra*, 312 U.S. at 95; *United States* v. *Jones*, 607 F.2d 269, 271-273 (9th Cir. 1979); *United States* v. *Hamel*, 551 F.2d 107, 113 (6th Cir. 1977); *United States* v. *Gordon*, 548 F.2d 743, 744-745 (8th Cir. 1977); *United States* v. *Melvin*, 544 F.2d 767, 775-777 (5th Cir.), cert. denied, 430 U.S. 910 (1977); *United States* v. *Radetsky*, 535 F.2d 556, 568 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Brewer*, 528 F.2d 492, 498 (4th Cir. 1975); *United States* v. *Carter*, 526 F.2d 1276, 1278 (5th Cir. 1976); *United States* v. *Smith*, 523 F.2d 771, 780 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States* v. *Librach*, 520 F.2d 550, 556 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976); *United States* v. *Eisenmann*, 396 F.2d 565, 567-568 (2d Cir. 1968). See also *United States* v. *Bishop*, 412 U.S. 346, 355-356 (1973); *Sansone* v. *United States*, 380 U.S. 343, 352-353 (1965); *Berra* v. *United States*, 351 U.S. 131, 134 (1956).[24]

[24] Petitioner LaRocca, relying on the variety of provisions prohibiting the use of a dangerous weapon to commit specific federal felonies, contends (78-6029 Br. 19-21) that "Congress has carefully graded the potential penalties for the use of a weapon in violation of these provisions according to the nature of the crime and the threat posed to the interests of the United States" (footnote omitted). In our view, however, such a diversity of provisions does not evidence a deliberate congressional effort to calibrate, on a precise and comparative basis, the exclusive penalties for using a dangerous weapon in the commision of a federal felony. As discussed in the text, a general and a more specific federal statute often provide dif-

In this case, as in *Batchelder*, the proper resolution to "harmonize" the statutes is to interpret Section 924(c) as an alternative to the enhancement provisions of Section 111 and the other similar laws dealing with the use of dangerous weapons in the commission of particular crimes. Such an interpretation reflects the settled rule that, when two statutes are applicable to the same criminal conduct, the prosecutor has discretion to select the proper charge. As the Court stated in *Batchelder*, *supra*, slip op. 9, 10-11 (citations omitted):

> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. * * * Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.
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> * * * [T]here is no appreciable difference between the discretion a prosecutor exercises when

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fering penalties for the same criminal conduct without either statute preempting the other. We submit that Congress, in enacting Section 924(c), intended to allow federal prosecutors the flexibility in each case to bring an appropriate charge under either Section 924(c) or the enhancement provision of the predicate felony (see pages 46-47, *infra*). Moreover, there is no reason to believe that Congress, having specifically studied the firearm problem in passing the Gun Control Act of 1968, intended to treat more leniently criminals who used firearms to assault a federal officer or rob a bank than those who used such weapons to commit myriad other federal offenses (see pages 21, 43 & n.7, *supra*).

> deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone does not give rise to a violation of the Equal Protection or Due Process Clauses. * * * Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.

See also *United States* v. *Brown*, 602 F.2d 909, 912 (9th Cir. 1979).[25]

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[25] Petitioner LaRocca hypothesizes (78-6029 Br. 21 n.21) that "the government's theory would create anomalies that Congress could not have intended between the penalties available to punish the use of a firearm and those available to punish the use of another type of dangerous weapon." As discussed above (pages 21-24, *supra*), however, the position advanced by petitioners entails a series of illogical results that seriously undermine their argument. In any event, the hypothetical difficulties posed by petitioner LaRocca can be resolved, as in a great many other areas of the law, through the exercise of sound prosecutorial discretion to bring an appropriate charge in each case either under Section 924(c) or under the enhancement provision of the predicate felony.

II. A DEFENDANT MAY BE CONSECUTIVELY SENTENCED FOR AIDING AND ABETTING AN ASSAULT WITH A FIREARM UPON A FEDERAL OFFICER, IN VIOLATION OF 18 U.S.C. 2 AND 111, AND FOR CARRYING A SECOND FIREARM DURING THE COMMISSION OF THAT ASSAULT, IN VIOLATION OF 18 U.S.C. 924(c)(2)

Petitioner Busic was charged (Counts 6 and 7) with aiding and abetting petitioner LaRocca in assaulting federal officers by means of a firearm, in violation of 18 U.S.C. 2 and 111;[26] on these counts

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[26] In addition to being present and armed during LaRocca's attack on the federal agents, Busic also appears to have originally purchased the pistol used by LaRocca (App. 29).

The district court's principal instructions to the jury on the charges against Busic of aiding and abetting LaRocca's assault were as follows:

> The Government contends, of course, as I understand it, that Busic was aware of the plan to rob Harvey and that he was there to assist LaRocca in all of the activities there and the fact that he did not fire merely indicates that he thought it better not to do so.
>
> As I have explained, one who aids and abets another to commit an offense is as guilty of the offense as if he had committed it himself. Accordingly, you may find Busic guilty of the offenses of assault upon federal officers if you find beyond a reasonable doubt that he was LaRocca's aider and abettor or counselor when they went to the shopping center. The question is did he associate himself with the venture, did he plan to help it succeed. This is, of course, for you to decide. If he had actually gone to the center to end the matter and if he did not aid and abet LaRocca, he would, of course, not be guilty of the assaults on the federal officers. [Tr. 604]
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> * * * * *
>
> THE COURT: Let the record show we are in open court. I have received a question from the jury which reads as follows: "Count Six. Even though Mr. Busic did not actively participate in the assault did his participation in the conspiracy make him guilty of the assault."
>
> Ladies and gentlemen, the answer to your question is yes unless you find that Busic withdrew from the conspiracy before the assault began or unless you find that as he claimed he went there merely for the purpose of telling Harvey that the deals were off. If he had withdrawn from the conspiracy before the assault began, he would not be guilty of the assault as an aider and abettor. If he was still a part of the conspiracy and intended to aid and abet LaRocca in the robbery in the event you find that the purpose in going to the shopping center was the robbery, then he would be guilty of the assault. This issue, of course, requires that you determine his mental state, that is, what he intended. [Tr. 629-631]

Busic received a sentence of five years' imprisonment (two years of which were perforce under the enhancement provision of Section 111). Busic was also charged (Count 18) with unlawfully carrying a second firearm during the commission of a federal felony, in violation of 18 U.S.C. 924(c)(2). On this count Busic was sentenced to a consecutive term of 20 years' imprisonment.

The district court denied Busic's post-trial motion for judgment of acquittal as to Counts 6 and 7 on the ground that LaRocca's armed assault on the federal officers was in furtherance of the original narcotics conspiracy and that therefore, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), Busic was liable for LaRocca's acts (App. 30-32). The court of appeals affirmed, finding that "the evidence overwhelmingly supports his conviction under both a conspiracy and an aiding and abetting theory. See *Nye & Nis[sen]* v. *United States*, 336 U.S. 613 (1949); *Pinkerton* v. *United States*, 328 U.S. 640 (1946)." (App. 53 n.12). Busic does not in this Court challenge his convictions for aiding and abetting.

Busic asserts as his "princip[al] contention" that Section 924(c)(2), which prohibits the unlawful carrying of a firearm during the commission of a federal felony, "does not apply where the underlying offense already contains a sentencing enhancement provision for use of a firearm" (78-6020 Br. 8). As we have shown above in Part I, however, Section 924(c) is fully applicable even though the predicate felony contains its own enhancement provision, so long as the defendant is not doubly punished for the same firearm element. Moreover, even if Section 924(c)(1) were inapplicable to such a felony, so that a defendant (like LaRocca) who *uses* a firearm to assault a federal officer could be punished only under Section 111, we submit that a defendant (like Busic) who unlawfully carries (but does not use) a firearm during the commission of that felony can properly be sentenced under Section 924(c)(2). The federal enhancement statutes (including Sections 111 and 2113) proscribe only the use of a dangerous weapon to commit the offense, and they contain no provision punishing the unlawful carrying of such a weapon. Thus, if Section 924(c)(2) were inapplicable, a defendant who unlawfully carries a firearm would receive no enhanced sentence and would be subject only to the same penalty as one who commits the offense without carrying a firearm—a result directly contrary to the language and legislative history of Section 924(c)(2), which unmistakably demonstrate that Congress intended to punish as a separate offense the

unlawful carrying of a firearm in the commission of a federal felony. See note 8, *supra*.

Busic also contends that this Court's decision in *Simpson* v. *United States*, *supra*, precludes the imposition of an additional penalty under Section 924(c)(2) for unlawfully carrying a firearm during the commission of an assault for which he received an enhanced sentence under Section 111.

If we are correct in the preceding argument (pages 17-47, *supra*) that a defendant may be sentenced either under Section 924(c) or under the enhancement provision of Section 111, then it is unnecessary for the Court to consider whether Busic was properly sentenced under both statutes. Since Busic's five-year sentence under Section 111 is concurrent with seven other five-year terms of imprisonment that are unchallenged, only his sentence under Section 924(c)(2) will actually affect his incarceration. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); compare *Benton* v. *Maryland*, 395 U.S. 784 (1969).[27]

In any event, in the circumstances of this case, petitioner Busic's consecutive sentences under Section 924(c)(2) and the enhancement provision of Section 111 were fully proper. Unlike the situation in *Simpson*, where the government was "able to prove violations of two separate criminal statutes with pre-

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[27] We also note that, even if Busic were correct that consecutive sentences are barred for the aggravated assault and the firearm offense, this would at most affect his Section 111 sentence and would leave intact the Section 924(c) sentence.

cisely the same factual showing" (435 U.S. at 11) and "relied on the same proofs to support the convictions under both statutes" (435 U.S. at 12), Busic's two convictions did not rest on identical evidence. Two separate firearms were involved in petitioners' shootout with federal officers. One firearm was used by petitioner LaRocca to assault BATF agents Alfree and Petraitis and DEA agent Macready. For his part in aiding and abetting LaRocca, Busic was sentenced to five years' imprisonment under 18 U.S.C. 2 and 111; the enhancement provisions of Section 111 were applicable because LaRocca had used a firearm and thus committed an aggravated assault. The second firearm was unlawfully carried (but not used) by Busic (a previously convicted felon) during LaRocca's armed assault; for this distinct offense, Busic received a consecutive sentence of 20 years' imprisonment under Section 924(c)(2) for unlawfully carrying a firearm during the commission of a federal felony. Since each of his convictions was based on a different firearm that was used or carried by a different person, Busic was properly sentenced to consecutive terms under Section 924(c)(2) and the enhancement provision of Section 111.[28]

[28] This is not a case that presents a question concerning "[w]hat Congress has made the allowable unit of prosecution." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952). See, *e.g.*, *Ladner* v. *United States*, 358 U.S. 169 (1958) (Congress did not intend that injuring two federal officers with one shot be punished as two separate offenses); *Gore* v. *United States*, 357 U.S. 386 (1958) (consecutive sentences allowable for multiple offenses arising out of a single narcotics transaction); *Bell* v. *United States*, 349 U.S. 81 (1955) (Congress did not intend that illegally carrying two women across state lines in one vehicle be punished as two separate crimes); *Blockburger* v. *United States*, 284 U.S. 299 (1932) (consecutive prison terms permissible for two crimes committed by a single sale of narcotics); *Ebeling* v. *Morgan*, 237 U.S. 625 (1915) (consecutive sentences upheld for cutting several mail bags in one transaction). See also *Sanabria* v. *United States*, 437 U.S. 54, 70 n.24 (1978). Such a question would be presented, for example, if a single defendant who used two firearms to assault a federal officer, or who fired two bullets from one gun at a federal officer, were prosecuted for two violations of the same statute. In this case, however, Busic was guilty both of aiding and abetting LaRocca's armed assault and of carrying his own firearm; these clearly presented distinct risks to the public good and constituted separate violations of different statutes.

Similarly, this is also not an appropriate case to consider whether *Simpson* would ever bar the government from proceeding under Section 924(c)(2) and the enhancement provision of Section 111. That issue would be posed, for instance, if a defendant who unlawfully carried and used a single firearm to assault a federal officer were prosecuted under Section 924(c)(2) for carrying the weapon and under the enhancement provision of Section 111 (but not under Section 924(c)(1)) for using the same firearm to commit the assault.

Nor, for the same reasons, do Busic's consecutive sentences under Section 924(c)(2) and the enhancement provision of Section 111 violate the Double Jeopardy Clause. For present purposes we may assume that the Double Jeopardy Clause forbids the imposition of cumulative penalties for convictions at a single trial of two crimes, one of which is a lesser

included offense of the other.[29] The usual standard for determining whether offenses are sufficiently distinct to permit cumulative punishment was set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." "This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977), quoting *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). See also *Harris* v. *United States*, 359 U.S. 19 (1959).

The *Blockburger* test is plainly satisfied in this case.[30] The offense of aiding and abetting an aggravated assault, in violation of 18 U.S.C. 2 and the

[29] It is our position, however, as we argue in our brief in *Whalen* v. *United States*, No. 78-5471, that the legislature may constitutionally authorize consecutive punishments even where the two statutory violations are not sufficiently distinguishable to constitute separate offenses under the *Blockburger* test. Since the *Blockburger* test is plainly satisfied in the instant case, the *Whalen* argument need not be pursued here.

[30] Indeed, the present case is not at all the type of situation that *Blockburger* was designed to address, since it is clear that Busic received consecutive sentences for two distinct acts rather than for "the same act." Such a case indisputably does not violate the Double Jeopardy Clause.

enhancement provision of 18 U.S.C. 111, requires proof, *inter alia*, that a dangerous weapon was in fact used to assault a federal officer and that the defendant aided and abetted that assault; for this offense, it is not necessary to prove that a firearm (rather than some other dangerous weapon, such as a knife) was used, that the defendant either carried or used the dangerous weapon, or that, if the defendant did carry the weapon, it was unlawful for him to do so. In contrast, a conviction under Section 924(c)(2) requires, *inter alia*, a showing that any federal felony (not necessarily assault on a federal officer) was committed, that the defendant actually carried a firearm (not any other type of dangerous weapon) during the commission of that felony, and that it was unlawful, under applicable federal, state or local law, for the defendant to carry the firearm.[31]

[31] The act of carrying the firearm must be independently unlawful under applicable federal, state or local law; unlawfulness based simply upon the fact that the firearm was carried in furtherance of the underlying felony is insufficient. See, *e.g.*, *United States* v. *Risi*, 603 F.2d 1193 (5th Cir. 1979); *United States* v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1978); *United States* v. *Garcia*, 555 F.2d 708 (9th Cir. 1977); *United States* v. *Akers*, 542 F.2d 770 (9th Cir. 1976), cert. denied, 430 U.S. 908 (1977); *United States* v. *Crew*, 538 F.2d 575 (4th Cir.), cert. denied, 429 U.S. 852 (1976); *Perkins* v. *United States*, 526 F.2d 688 (5th Cir. 1976); *United States* v. *Howard*, 504 F.2d 1281 (8th Cir. 1974); *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973); *United States* v. *Sudduth*, 457 F.2d 1198 (10th Cir. 1972). During the House debates on the Casey amendment, several congressmen expressed concern that the proposal, as originally introduced, might impose stiff penalties upon police-

Thus, it is evident that the elements of the offenses are sufficiently distinct to meet the *Blockburger* test. See *Wayne County Prosecutor* v. *Recorder's Court Judge*, 280 N.W.2d 793 (Mich. 1979), appeal dismissed for want of a substantial federal question *sub nom. Brintley* v. *Michigan*, No. 79-5506 (Nov. 13, 1979); *West* v. *United States*, No. 78-5252 (6th Cir. Nov. 14, 1979), slip op. 3-4; *Kowalski* v. *Parratt*, 533 F.2d 1071 (8th Cir.), cert. denied, 429 U.S. 844 (1969).

Furthermore, because two separate guns were involved in this case, the prosecution was required to prove, and the jury was required to find, independent facts as to each offense. As the Court noted in *Brown* v. *Ohio*, *supra*, 432 U.S. at 167 n.6, strict application of the *Blockburger* test would permit imposition of consecutive sentences in these circumstances because separate convictions for aiding and abetting an assault with one firearm and for unlawfully carrying a second firearm require proof in each count that a different firearm was involved. See also *Ebeling* v. *Morgan*, *supra*, 237 U.S. at 631. Hence, under this analysis as well, it is again apparent that Busic's consecutive sentences pursuant to Sections 924(c)(2) and 111 are not barred by the Double Jeopardy Clause.

men or other licensed gun carriers who were later found to have committed federal felonies while lawfully carrying their firearms. See, *e.g.*, 114 Cong. Rec. 21788-21789, 21792, 22231 (1968). In order to avoid this result, the Poff amendment included the requirement that the firearms be carried "unlawfully" (*id.* at 22231), and the House rejected an amendment that would have deleted the word "unlawfully" from the Poff proposal (*id.* at 22236, 22237, 22245).

III. IN THE EVENT THE COURT VACATES PETITIONERS SECTION 924(c) SENTENCE, THE APPROPRIATE DISPOSITION OF THE CASE WOULD BE TO REMAND TO THE DISTRICT COURT FOR RE-SENTENCING ON THE SECTION 111 COUNTS

In the event the Court disagrees with our principal contention that petitioners were properly sentenced under Section 924(c), the question remains what disposition of the case would be "just under the circumstances" (28 U.S.C. 2106). We submit that the appropriate course in this case would be to vacate petitioners' sentence on the Section 111 counts and to remand for re-sentencing on those counts, subject to (1) the maximum statutory penalty authorized by Section 111, and (2) the limitation that the new sentence cannot exceed that previously imposed for the armed assault offenses under Sections 924(c) and 111.[32]

Petitioners Busic and LaRocca were respectively found guilty in this case on 16 and 14 felony counts, including, as relevant here, two armed assaults on federal officers. Prior to this Court's decision in *Simpson* v. *United States*, *supra*,[33] petitioners were

[32] The disposition we suggest would be equally applicable if the Court holds that petitioner Busic's sentence under Sections 924(c) and 111 was inconsistent with *Simpson* v. *United States*, *supra*, or violated the Double Jeopardy Clause.

[33] Petitioners were sentenced on March 11, 1977 (App. 17-20), almost a year before this Court's decison in *Simpson* v. *United States*, *supra*.

each sentenced for their armed assaults to 25 years' imprisonment (five years of which were made concurrent with other terms of imprisonment not at issue here).[34] If they prevail in this Court and have their sentence under Section 924(c) vacated, petitioners will be subject to only a five-year term of imprisonment for the armed assault offenses.

Such an unanticipated and undeserved windfall to petitioners should not be countenanced. Whether their criminal conduct is denominated as a violation of Section 924(c), or of Section 111, or both, petitioners engaged in criminal activities calling for severe condemnation and punishment. The district court im-

[34] Petitioners were sentenced to a term of five years' imprisonment under Section 111 (Counts 6 and 7) and to a consecutive term of 20 years' imprisonment under Section 924(c) (Count 18 for petitioner Busic, and Count 19 for petitioner LaRocca). Petitioners' sentence under Section 111 was concurrent with their sentence of five years' imprisonment for firearms offenses other than Section 924(c). In addition, petitioners were sentenced to a consecutive term of five years' imprisonment for various narcotics offenses. In total, each petitioner received a sentence of 30 years' imprisonment. See page 5, *supra*.

Because the maximum penalty that could be imposed under Section 111 for two counts of armed assault is 20 years' imprisonment (two consecutive 10-year terms), petitioners' re-sentence on remand would in fact be less than the 25 years' imprisonment (five years of which were concurrent with the sentences on other counts) they originally received for the armed assaults under Sections 924(c) and 111. Nevertheless, such a 20-year sentence, if made consecutive to the sentences on the other charges of which petitioners were convicted, would result in a total term of 30 years' imprisonment, the same cumulative sentence that was initially imposed.

posed substantial terms of imprisonment commensurate with the gravity of petitioners' acts, and it is of no practical consequence that petitioners' sentence for the armed assaults was apportioned between the counts under Section 924(c) and those under Section 111. Petitioners now seek to have their armed assault sentence reduced from 25 years' imprisonment to five years' imprisonment because of this Court's intervening decision in *Simpson* v. *United States*, *supra* —a decision that the district court could not have taken into account in structuring petitioners' sentence. It is, we think, inconceivable that the district judge, who elected a total sentence of 25 years for the assaults and chose Section 924(c) as the primary vehicle for that result, would have sentenced petitioners to only five years for their conduct had he known that Section 111 was the sole provision under which the armed assaults could be punished.[35] Indeed, since petitioners' sentence on the Section 111 counts is concurrent with other sentences they received, vacation of the Section 924(c) sentence would mean that petitioners would in effect be subject to no augmented punishment for their armed assaults. In these circumstances, we submit that the appropriate disposition of this case (assuming the Court con-

[35] Since the legal issue petitioners raise concerns purely formal and technical aspects of the sentencing and is wholly unrelated to the choice of a just punishment for their criminal conduct, it seems especially unlikely that the district court would have imposed a sentence of only five years for the armed assaults if it had understood the law to be as petitioners now contend.

cludes that petitioners' Section 924(c) sentence was unauthorized) is to remand to the district court for re-sentencing on the Section 111 counts subject only to (1) the maximum penalties prescribed by Congress in that statute, and (2) the restriction that the new sentence imposed on each petitioner for the armed assault offenses not exceed the original total sentence he received for those offenses.[36]

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[36] *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), is not to the contrary. In *Addonizio*, the Court held that Section 2255 relief was not available to a prisoner who claimed that a change in the policies of the United States Parole Commission had frustrated the sentencing judge's subjective intent concerning the expected term of actual imprisonment. Unlike *Addonizio*, the instant case does not involve the "settled law that * * * narrowly limit[s] the grounds for collateral attack on final judgments" (slip op. 6). Moreover, our contention does not turn on "the subjective intent of the sentencing judge" (slip op. 9) or on the judge's "expectations with respect to the actual release of a sentenced defendant short of his statutory term" (slip op. 11). Rather, our position depends solely on the objective fact that the district judge sentenced petitioners to 25 years' imprisonment for their armed assaults on federal officers—a decision that unquestionably was "his to make" (slip op. 11) and was not committed to any other institution of government.

Of course, the district court on remand is not obligated to impose a sentence equivalent to that originally ordered. If, for example, the initial sentence was influenced by the fact that petitioners violated both Section 924(c) and Section 111, then the re-sentence on the Section 111 counts alone might be appreciably less than the earlier sentence. On the other hand, if, as we believe likely, the initial sentence reflected the district court's view that petitioners' armed assaults on federal officers, in light of their prior criminal records and prospects for rehabilitation, warranted a sentence of 25 years' imprisonment and that the apportionment of this sentence between

We acknowledge the double jeopardy implications of the disposition we propose, but we believe that such concerns cannot withstand analysis.

The Double Jeopardy Clause "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). Only the last of these three protections is involved here.

In our view, the course we advocate cannot be said in any meaningful sense to constitute "multiple punishments for the same offense." As the Court held in *Pearce*, *supra*, the Double Jeopardy Clause does not "impose[] an absolute bar to a more severe sentence upon reconviction" (395 U.S. at 723).

> [A]t least since 1919, when *Stroud* v. *United States*, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction. * * *

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the two statutes was immaterial, then the re-sentence would, to the extent possible, parallel the earlier punishment. The critical point here is whether anything in the Double Jeopardy Clause precludes a remand to the district court for such re-sentencing, which this Court is statutorily empowered to order under 28 U.S.C. 2106.

> Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. * * * [If a new trial] does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. [395 U.S. at 720-721; footnotes omitted].

Although petitioners in the instant case have not challenged their conviction or sentence under Section 111, we submit that the Double Jeopardy Clause does not forbid the district court to re-sentence them on the Section 111 counts if their sentence under Section 924(c) is upset at their behest. As in *Pearce*, petitioners initiated the appellate proceedings that give rise to the need for re-sentencing. Cf. *United States* v. *Scott*, 437 U.S. 82, 93, 98-99 (1978). Thus, this is not a case in which the government instituted steps to increase a defendant's punishment on a given count, and there is no "act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, *supra*, 437 U.S. at 91. In addition, the sentences under Section 924(c) and Section 111 derive from the same armed assaults on federal officers. Since petitioners would not on remand be subject to any greater sentence for the armed assaults than the

25 years' imprisonment they initially received (including credit for time already served, see *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717-719), they would suffer no enhanced or multiple punishment for those offenses.[37]

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[37] Since, under this analysis, petitioners' sentences would not be increased by re-sentencing, the due process protections against vindictiveness recognized in *North Carolina* v. *Pearce*, *supra*, are inapplicable here. Moreover, "the possibility that a defendant might be deterred [by this result] from the exercise of a legal right [to appeal]" does not violate the Due Process or Double Jeopardy Clauses. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). See also *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 29 (1973); *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 719-721. Indeed, since the appeal could not result in a higher sentence than that originally imposed, there could be no deterrent to an appeal.

For the same reasons, the court of appeals erred in concluding (App. 47) that petitioner LaRocca could not be re-sentenced to a greater punishment on the Section 924(c) count or on the Section 111 counts (whichever the government elects for re-sentencing) than he had initially received for the offense. As discussed in the text, the appropriate standard for measuring the severity of the re-sentence is the composite sentence initially imposed on the armed assault counts under Sections 924(c) and 111. Nor would the disposition we propose "allow the government to do indirectly what * * * it cannot do directly." *United States* v. *Stewart*, 585 F.2d 799, 801 n.5 (5th Cir. 1978), cert. denied, No. 78-6007 (Apr. 30, 1979). Rather, this procedure will enable the district court to impose whatever sentence it would have initially ordered for the armed assault offenses if it had been aware of the legal restrictions on its sentencing power, subject to the limitation that petitioners cannot be given a greater punishment than they originally received.

This Court has also recognized that an unlawful sentence can be corrected without running afoul of the Double Jeopardy Clause even if the revised sentence exceeds the original one. See *Bozza* v. *United States*, 330 U.S. 160 (1947); *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900); see also *Pollard* v. *United States*, 352 U.S. 354 (1957). "To hold otherwise would allow the guilty to escape punishment through a legal accident" (*Pollard* v. *United States*, *supra*, 352 U.S. at 361), for "[i]f this inadvertent error cannot be corrected * * * no valid and enforceable sentence can be imposed at all" (*Bozza* v. *United States*, *supra*, 330 U.S. at 166). Analogously to those cases, petitioners here, if not subject to re-sentencing, would in a very real sense be allowed to escape punishment for the aggravated offense of armed assault. To the extent that the district court, following reversal of the Section 924(c) convictions, cannot bring petitioners' sentence into line with the penalty it originally intended and imposed for the armed assaults, petitioners will be allowed through a legal accident to escape the full and fair measure of their punishment. Indeed, under the existing sentence, petitioners have received concurrent five-year terms of imprisonment on the two Section 111 counts of armed assault, a lesser penalty than could have been imposed for two *unarmed* assaults on federal officers. See also page 59, *supra*.

It is well settled that "[c]orresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *United States* v. *Tateo*,

377 U.S. 463, 466 (1964). See also, *e.g.*, *United States* v. *Scott*, 437 U.S. 82, 92 (1978). Inherent in this societal interest is the fundamental recognition that a convicted defendant should receive an appropriate sentence that reflects his character and the nature and severity of his criminal conduct. See, *e.g.*, *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires * * * that there be taken into account the circumstances of the offense together with the character and propensities of the offender."). As *North Carolina* v. *Pearce* and *Bozza* v. *United States* illustrate, the Double Jeopardy Clause does not render nugatory or illegitimate the societal interest in having just sentences meted out to convicted defendants. While the Double Jeopardy Clause was designed "to protect the integrity of a final judgment" (*United States* v. *Scott*, 437 U.S. 82, 92 (1978)) and requires due regard for "principles of fairness and finality" (*United States* v. *Wilson*, 420 U.S. 332, 343 (1975)), it cannot be said that to allow petitioners to be re-sentenced following their successful appeal in this case would forsake these precepts. Likewise, it is at best a semantic exercise to conclude that re-sentencing petitioners to no greater penalty than they originally received for their armed assaults on federal officers would be to subject them "to the possibility of further punishment by being again * * * sentenced for the same offense" (*ibid.*). If petitioners' Section 111 sentences are vacated and the case remanded for re-sentencing, "we cannot say that the constitutional

guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721.

This Court has never considered whether a defendant who succeeds in challenging one of two related sentences can be subject to re-sentencing on the unchallenged count. The lower federal courts have resolved this question against the government.[38] In our view, however, these decisions have simply seized, without further analysis, on the perceived double-jeopardy rule that in no circumstances can a valid sentence on an uncontested conviction be in-

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[38] See *United States* v. *Frady*, 607 F.2d 383 (D.C. Cir. 1979); *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969); *United States* v. *Bynoe*, 562 F.2d 126 (1st Cir. 1977); *United States* v. *Sacco*, 367 F.2d 368 (2d Cir. 1966); *United States* v. *Fredenburgh*, 602 F.2d 1143 (3d Cir. 1979); *United States* v. *Benedetto*, 558 F.2d 171 (3d Cir. 1977); *Government of the Virgin Islands* v. *Henry*, 533 F.2d 876 (3d Cir. 1976); *United States* v. *Corson*, 449 F.2d 544 (3d Cir. 1971) (en banc); *United States* v. *Welty*, 426 F.2d 615 (3d Cir. 1970); *Whaley* v. *North Carolina*, 379 F.2d 221 (4th Cir. 1967); *Chandler* v. *United States*, 468 F.2d 834 (5th Cir. 1972); *United States* v. *Adams*, 362 F.2d 210 (6th Cir. 1966); *United States* v. *Turner*, 518 F.2d 14 (7th Cir. 1975); *United States* v. *Durbin*, 542 F.2d 486 (8th Cir. 1976); *United States* v. *Edick*, 603 F.2d 772 (9th Cir. 1979); *United States* v. *Best*, 571 F.2d 484 (9th Cir. 1978); *Kennedy* v. *United States*, 330 F.2d 26 (9th Cir. 1964); *Owensby* v. *United States*, 385 F.2d 58 (10th Cir. 1967).

creased. As discussed above, however, such a rule is unfounded.[39]

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[39] The Third Circuit has endeavored to support this asserted rule on the theory that "the constitution protects the expectations created in a defendant when he is properly convicted and sentenced [on a given count]." *United States* v. *Fredenburgh*, *supra*, 602 F.2d at 1147-1148. "Perhaps the best explanation for this rule is that a defendant's initial expectations as to the maximum sentence he must serve on a valid judgment of conviction should not be defeated * * *." *Id.* at 1148. It is wholly unrealistic, however, to believe that petitioners' original sentence created an expectation that they would not be imprisoned for more than five years on the Section 111 counts. Rather, petitioners knew that they had received an overall sentence of 30 years' imprisonment in this case and a composite sentence of 25 years' imprisonment (five years of which were concurrent with other terms of incarceration) for the armed assault offenses.

In any event, the Double Jeopardy Clause does not require that considerations other than a defendant's expectations be disregarded. Neither *North Carolina* v. *Pearce* nor *Bozza* v. *United States* turned on the existence or predominance of a defendant's expectations; rather, they represent the careful accommodation of the right of the defendant to fair treatment and the interest of society in the just disposition of criminal cases. Likewise, the Third Circuit's view that the Double Jeopardy Clause vests a defendant with an indefeasible expectation that his sentence on one of a series of related counts will not be changed, regardless of the interests of justice and of society, cannot be squared with the principle derived from *United States* v. *Wilson*, *supra*, that a defendant's expectations arising from an acquittal by the trial court following a jury verdict of guilty are subject to defeasance when the favorable action is premised upon a legal error (see 420 U.S. at 345). In the same way, we suggest that the Double Jeopardy Clause does not make inviolable whatever expectations petitioners might have in this case or entitle petitioners to a windfall reduction in their sentence by barring the district court from re-sentencing them on the Section 111 counts up to the penalty previously imposed for the armed assault offenses under Sections 924(c) and 111.

Moreover, these lower federal court decisions are almost uniformly premised on what we believe is a superficial and incorrect reading of this Court's decision in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). In *Lange*, the trial court sentenced the defendant to imprisonment *and* a fine even though the punishment authorized by statute was imprisonment *or* a fine. After defendant had paid the fine, the trial court sought to correct the sentence by imposing only a term of imprisonment. This Court held that once the defendant had paid the fine (which had gone into the Treasury and therefore could not be refunded), he had satisfied a sentence authorized by statute and thus could not thereafter be re-sentenced without being subjected to impermissible double punishment:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And * * * there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, *supra*, 85 U.S. (18 Wall.) at 168, quoted in *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717-718. See also *In re Bradley*, 318 U.S. 50 (1943); *United States* v. *Benz*, 282 U.S. 304, 307 (1931).

The imposition of both a fine and imprisonment in *Ex parte Lange* was a multiple punishment prohibited by the Double Jeopardy Clause precisely be-

cause Congress had not authorized both penalties; it had authorized only one or the other.[40] In our view, *Ex parte Lange* holds that "the role of the * * * [Double Jeopardy Clause] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). Such a rule has no bearing on the question whether a defendant who successfully attacks certain counts of his conviction or punishment can be re-sentenced on the remaining counts that grow out of the same criminal conduct as the invalidated counts. Notwithstanding *Ex parte Lange*, we submit that where an unlawful act results in a multi-count prosecution under more than one federal statute, the Double Jeopardy Clause does not bar a defendant from being re-sentenced on the outstanding counts if his conviction or sentence on the other counts is overturned on his appeal, provided that the re-sentence complies with the maximum penalty authorized by statute for each count and does not exceed the aggregate sentence originally imposed for such criminal conduct.

In the instant case, it is clear that petitioners' sentences under Section 924(c) and Section 111 de-

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[40] It is not entirely clear why the Court in *Ex parte Lange* rested its decision on double jeopardy grounds, since the same result was compelled by the statute under which the defendant was convicted, wholly without regard to the existence of the constitutional double jeopardy protection. Moreover, it would seem indisputable that the Due Process Clause would preclude the imposition of a sentence depriving a defendant of either liberty or property in a manner or to an extent not authorized by statute.

rive from the same criminal act—the armed assaults of federal officers. For this criminal conduct, petitioners were each sentenced to consecutive terms of 20 years' imprisonment on the Section 924(c) count and five years' imprisonment on the Section 111 counts. If this Court vacates the Section 924(c) counts, the fact that petitioners' sentences were allotted between two statutes should not, as a matter of constitutional command, entitle petitioners to serve only a five-year term of incarceration on the Section 111 counts. Instead, the case should be remanded to the district court to re-sentence petitioners on the Section 111 counts, subject to the limitation that such re-sentence cannot exceed either the maximum penalty allowed by that statute or the total sentence previously imposed on petitioners under Sections 924(c) and 111 for the armed assault offenses of which they were convicted.[41]

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[41] In our view, there is no procedural impediment to the Court's consideration of this issue even though the government did not file a cross-petition for a writ of certiorari. (We note that the issue was presented in the government's brief in the court of appeals (Brief for Appellee at 19-21, Nos. 77-1375, 77-1376 (3d Cir.)) and in the Brief for the United States as respondent at the petition stage (page 11 n.10).) This issue is incident to the Court's "plenary authority under 28 U.S.C. § 2106 to make such disposition of the case 'as may be just under the circumstances.'" *Haynes* v. *United States*, 390 U.S. 85, 101 (1968). Moreover, we address here only the question of the proper disposition of the case in the event the judgment of the court of appeals is reversed—a matter the Court would be obliged in any event to consider. Since the government was and is satisfied with the court of appeals' judgment, and since the disposition we propose would not grant the government any greater relief than was afforded by the court of appeals, there should be no requirement that a cross-petition be filed. Finally, we note the tremendous burden that would be imposed on the federal government and on this Court if the government were obligated to scrutinize each of the thousands of cases every Term in which it is or might be a respondent to determine whether a cross-petition is necessary to protect, in the event certiorari is granted, the fruits of a lower court judgment with which it is content. See Stern, *When to Cross-Appeal or Cross-Petition —Certainty or Confusion?*, 87 Harv. L. Rev. 763, 775-776 (1974).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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